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No. 84-177

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,
vs.
JAMES HAMMOCK, JR.,

Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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IT IS NECESSARY FOR THIS COURT TO REVIEW THE ILLINOIS APPELLATE COURT'S ERRONEOUS RETROACTIVE APPLICATION OF EDWARDS V. ARIZONA, AND MIS-APPLICATION OF THE EDWARDS DECISION, WHERE THE EDWARDS DECISION IS PROPHYLACTIC IN NATURE AND WHERE THE LAW ENFORCEMENT OFFICALS INVOLVED IN THE INSTANT CASE ACTED REASONABLY AND IN ACCORDANCE WITH EXISTING DECISIONS OF THIS AND OTHER COURTS.

Respondent contends that it is unnecessary for this Court to review whether this Court's decision of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981), should be applied retroactively claiming that respondent is entitled to suppression of his statement confessing to murder, including a videotape of that confession, pursuant to pre- Edwards case law. A review of the facts in the instant case reveals that respondent was not interrogated after he requested counsel but that he was allowed to make a statement after respondent later decided to make a statement without the presence of his attorney, subsequent to being provided with his requested attorney's telephone number and before making any attempt to contact his attorney.

Respondent in his brief chooses not to discuss the appropriateness of retroactive

application of Edwards, upon which the Illinois Appellate Court relied in reversing respondent's conviction of murder, and relies instead upon a claim that pre-Edwards case law supported reversal. Certainly the traditional factors utilized in determining whether a decision should receive retroactive application, which are set forth in the State of Illinois' petition, militate against a retroactive application of Edwards. As this Court indicated in Solem v. Stumes, 104 S.Ct. 1338, 1343 (1984),

> The Edwards rule is a far cry from the sort of decision that goes to the heart of the truthfinding function, which we have consistently held to be retroactive. [citations omitted] Rather, it is a prophylactic rule, designed to implement pre-existing rights. This Court had not applied such decisions retroactively.

The purpose of a prophylactic rule such as the one set forth in Edwards is to guide law enforcement officials in their conduct to assure the fullest implementation of an accused's pre-existing rights. To penalize law enforcement officials and indeed all the People of the State of Illinois by allowing a murderer to go free because of the inability to foresee a decision almost three years later does nothing to serve the purpose of this Court in Edwards.

Further, the evidence produced at trial established that the law enforcement officials involved conducted themselves in accordance with pre- Edwards case law. Although respondent requested counsel after arrest but before charging, respondent made no statements to any law enforcement official until he knowingly and willingly waived his right to counsel. Although respondent spoke to various police officers

after his initial arrest, on a speeding charge, in Chicago, Illinois, at Cook County Jail and later in Brookfield, Illinois, it is clear that no officer attempted to interrogate respondent concerning the murder charge. (R. 4, 6, 8-9) Subsequently, a felony review supervisor with the Cook County State's Attorney's Office informed respondent of his Miranda rights. (R. 62-63) Respondent's will had not been worn down nor was respondent badgered into surrendering his Miranda rights as was the defendant in Edwards, supra, 451 U.S. at 479. Rather, respondent, fully aware of his rights, stated that he wanted his attorney. At that time the assistant state's attorney learned from respondent who his attorney was, obtained the attorney's telephone number for respondent and gave that number to respondent. These facts were confirmed by re-

spondent. (R. 65-66, 51-52) As the assistant state's attorney walked to the door to leave and allowed respondent to call his attorney, respondent said he would tell the assistant state's attorney what had happened. (R. 66) Respondent was asked again if he wanted his attorney but declined. (R. 66) This sequence of events closely resembles those set forth by this Court in Oregon v. Bradshaw, 103 S.Ct. 2830 (1983), wherein this Court stated:

> An incarcerated person, accused of a crime, does not remain silent and speak only when conversation is initiated by others, whether by fellow prisoners, guards, or law enforcement officers. Jail or prison confinements prior to indictment or trial may extend over days and weeks, and numerous conversations customarily occur, often accompanied by

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> collateral facts and circumstances. Rarely can a Court properly focus on a particular conversation, and intelligently base a judgment on the simplistic inquiry as to who spoke first.
>
> In this case, for example, Bradshaw's initiating question . . . was not an isolated event. It was immediately followed by a renewal of Miranda warnings and additional conversation.

In the instant case respondent was allowed to consult with counsel after requesting counsel, rejected counsel, was readvised of his right to counsel and stood on his knowing waiver of those rights. Respondent, in the instant case, was not placed in a position where he was led to believe he would be prohibited from exercising his constitutional rights. Rather, the conduct of the assistant

state's attorney confirms the fact that the State was seeking to assure that respondent was able to fully implement his constitutional rights.

As this Court stated in Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019 (1983): "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." In the instant case there can be no doubt that respondent understood his right to counsel, since he requested his attorney shortly before he decided to make a statement without his attorney. Further, "[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." Id. At the time of respondent's statement, respondent was

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thirty-nine-years old and had attended high school. (R. C1085) Furthermore, respondent had been gainfully employed at the same business for seven years prior to the time of his arrest. (R. C1086) Nothing in the record suggests that respondent was young, naive, incompetent or unable to knowingly waive his right to counsel.

Respondent was not subjected to interrogation prior to his waiving counsel. The communications with respondent by the assistant state's attorney prior to respondent waiving counsel and making his statement were to inform respondent of his Miranda rights and assist respondent in locating respondent's attorney's telephone number. Those acts cannot be construed as interrogation under the standard set forth in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 1689 (1980), the Miranda decision, nor even the Edwards decision.

Respondent's claim that his statement is entitled to suppression based upon pre-Edwards case law is without merit, and respondent knowingly and willingly waived counsel prior to making any statement. Therefore this Court should review the erroneous decision of the Illinois Appellate Court.

II.

THE ILLINOIS APPELLATE COURT ERRONEOUSLY CONCLUDED THAT A VIDEOTAPE OF RESPONDENT'S STATEMENT WAS IMPROPERLY INTRODUCED INTO EVIDENCE ALTHOUGH THE VIDEOTAPE OF AN EARLIER ATTEMPT TO RECORD RESPONDENT'S STATEMENT WAS NOT PRODUCED SINCE THERE IS NO EVIDENCE OF, NOR SUGGESTION OF, WRONGDOING ON THE PART OF THE STATE AND SINCE BOTH THE STATE AND RESPONDENT AGREED THAT THE STATEMENT MADE IN THE SECOND VIDEOTAPE WAS VIRTUALLY THE SAME STATEMENT AS THAT MADE DURING THE FIRST VIDEOTAPING EFFORT AND WHERE BOTH STATEMENTS WERE VIRTUALLY THE SAME AS RESPONDENT'S INITIAL ORAL STATEMENT.

Respondent contends that reversal of his conviction can be sustained upon an independent State ground, i.e., that the

trial court erroneously admitted a videotape of respondent's statement into evidence where the videotape of an initial attempt to record respondent's statement was not produced in court. While the Appellate Court of Illinois found the admission of the videotape to be reversible error, that finding was not supported by any case law or statutory citation. The State of Illinois strongly maintains that Illinois law justifies the admission of the videotape into evidence.

After respondent made an oral statement to the assistant state's attorney, respondent was asked if he would make the statement on videotape. (R. 67) Respondent agreed and after the taping was completed an attempt was made to show the tape to respondent. (R. 67) Both respondent and the assistant state's attorney agreed that no picture came on the tele-

vision screen when that attempt was made. (R. 56, 67) New video equipment was brought in and respondent made his statement again. (R. 67-68) At the conclusion of the taping respondent and the assistant state's attorney watched the tape together. (R. 68) The assistant state's attorney testified that the second videotape contained substantially the same statement as was made during the first videotaping effort. (R.68) Respondent agreed that he did and said basically the same things during the second taping as he did during the first and that both were basically the same, as he had told the assistant state's attorney during the original oral statement. (R. 57) The assistant state's attorney did not know what had happened to the first videotape. (R. 82)

As the People and respondent are in agreement that the second taping was sub-

stantially the same as the first, and the second tape was substantially the same as respondent's initial statement to the assistant state's attorney, it is impossible to envision any prejudice whatsoever to respondent because of the unavailability of the first tape. Since the record fails to demonstrate intentional rather than inadvertent loss and since prejudice is not present, reversal of respondent's conviction of murder is unwarranted. In People v. Jiles, 13 Ill. App.3d 245, 250, 300 N.E.2d 803 (1st Dist. 1973), the appellate court held that defendant was not prejudiced by the destruction of police radio tapes where there was no evidence to indicate the tapes were destroyed to prevent their production at trial. Similarly, in People v. Utinans, 55 Ill. App.3d 306, 319-320, 370 N.E.2d 1080 (1st Dist. 1978), the Illinois Appellate Court found the

inadvertent loss of tape recordings of interviews with the victim made shortly after the offense was not prejudicial where there was no showing of an exculpatory nature of the evidence nor a demonstration of an intentional failure of the prosecutor to preserve evidence. In People v. Ash, 16 Ill. App.3d 633, 635-636, 306 N.E.2d 319 (2d Dist. 1974), the appellate court found no prejudice to defendant where a videotape was entered into evidence despite the fact that erasures on the tape by the State exceeded the deletions ordered by the court. In Ash, the court and both counsel had an opportunity to view the tape prior to the partial erasure. Id. at 636. Although the court did not view the first videotape in the instant case, respondent, a participant in both tapings, indicated that his statements in the first and second tapings were essentially the same and that

both statements were about the same as his original statement. In the instant case, neither misconduct nor prejudice were demonstrated and the appellate court was erroneous in finding the tape's admission into evidence improper.

Thus, Illinois case law does not support the Illinois Appellate Court's determination that the videotape was improperly introduced in evidence. Furthermore, even if this Court determines that an independent State ground would bar use of the videotape in evidence, it is nevertheless necessary for this Court to determine the retroactivity of the Edwards decision. Prior to the attempts, one of which was successful, to videotape respondent's statements, respondent made an oral statement to an assistant state's attorney. If retrial were necessary, the State of Illinois would seek to introduce evidence

of respondent's initial statement into evidence. Thus a determination as to the retroactivity of Edwards and indeed as to the State's compliance with Edwards, assuming, arguendo, that Edwards is to be applied retroactively, is necessary even assuming an independent State ground to support reversal.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully pray that a writ of certiorari issue to review the judgment of the Illinois Appellate Court, First Judicial District, Third Division.

Respectfully submitted,

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